NO. 88-530

Supreme Court, U.S.
FILED
DEC 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term 1988

JOSE SALDANA,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent
One Hogan Place
New York, New York 10013
(212) 553-9000

NORMAN BARCLAY
ANN M. DONNELLY
ASSISTANT DISTRICT ATTORNEYS
Of Counsel

TABLE OF CONTENTS

Page

TABLE OF CASES i

PRELIMINARY STATEMENT. 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 10

CONCLUSION 16

TABLE OF AUTHORITIES

CASES — PAGE

Barclay v. Florida, 463 U.S. 939 (1983).....12

Beck v. Washington, 369 U.S. 541 (1962).....12

Chapman v. California, 386 U.S. 18 (1967).....14

Evitts v. Lucey, 469 U.S. 387 (19850.....13

Griffin v. Illinois, 351 U.S. 12 (1956).....13

People v. Saldana, 62 N.Y. 623 (1984).....6

People v. Saldana, 99 A.D.2d 686 (1st Dep't 1984)..6

Pulley v. Harris, 465 U.S. 37 (1984).....12

Smith v. Phillips, 455 U.S. 209 (1982).....12

United States v. Ciambrone, 601 F.2d 616 (2d Cir. 1979).....12

United States v. Mechanik, 475 U.S. 66 (1986).....15

United States v. Johnson, 268 U.S. 220 (1925).....10

Wainwright v. Goode, 464 U.S. 78 (1983).....12

OTHER AUTHORITIES

Rules of the Supreme Court, Rule 17.....10

CPL §450.90.....6

CPL §190.50(5).....3

No. 88-530
In The
SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOSE SALDANA,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF IN RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Jose Saldana seeks a writ of certiorari to review a June 27, 1988 order of the United States Court of Appeals for the Second Circuit. That order reversed a judgment of the United States District Court for the Southern District (Broderick, J.), which had vacated an October 1, 1981 judgment of the New York Supreme Court, New York County (Roberts, J.). By that judgment, the petitioner was convicted, after a jury trial, of Attempted Murder in the First Degree (New York Penal Law §§ 110.00/125.27[1]), Assault in the First Degree (Penal

Law § 120.10[1]), Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03), and Criminal Possession of Stolen Property in the Third Degree (Penal Law § 165.40). The petitioner was sentenced as a predicate felon (New York Penal Law §70.00) to serve concurrent, indeterminate prison terms of from twenty-five years to life on the attempted murder count, seven and a half to fifteen years on the assault and weapons counts, and one year on the stolen property count. These sentences were to run consecutive to a federal sentence for bank robbery that the petitioner has already served.

STATEMENT OF THE CASE

In the early morning hours of July 3, 1979, the petitioner, Maliki Latine and two other men were riding in a stolen car that was involved in an accident with a taxicab. When the petitioner and his companions drove away from the scene without producing a license or registration, the cab driver and another taxi followed. The petitioner then fired his gun at the pursuing cars, and the drivers reported the shooting to the police.

About an hour and a half later, two uniformed officers in a marked police car came upon the stolen car. At first, the officers thought there were three

men in the car: two in the front and the petitioner in the back. In fact, Maliki Latine was also in the back seat, hidden from view. When the officers were approximately ten feet from the car, the petitioner dropped from sight, held a gun to Latine's head and ordered him to fire. The officers then saw Latine appear in the rear seat, holding a shotgun. He fired at Sergeant Patrick Pellicano's face, hitting him in the eye, and causing the eventual loss of that eye. The officers returned the fire and the petitioner and his companions fled. The petitioner was arrested in February of 1982.

New York Criminal Procedure Law provides that a defendant may appear before the grand jury considering his case if he notifies the District Attorney, in writing, of his desire to do so. CPL § 190.50(5). On February 28, 1980, the petitioner sent a letter, not to the District Attorney, but to a Criminal Court judge, the Honorable Murray Mogel. In that letter, the petitioner stated his desire to appear before the grand jury. At a calendar call, the petitioner's attorney explained, orally, that the petitioner wanted to testify before the grand jury. Justice Mogel advised the petitioner's attorney to "call the assistant [district attorney] and work that out because I'm giving you a short date because if they intend to indict they

would do it quickly." On March 19, 1980, the petitioner appeared pro se before Judge Mogel and made another oral request, which the assistant district attorney assigned to the court part said he would note on the "D.A.'s papers." In addition, Justice Mogel remarked that the petitioner wanted to testify before the grand jury. The court also made a notation on its own file that the petitioner wanted to appear in the grand jury; that file was then sealed, and was not available to the People.

The state grand jury indicted the petitioner and Maliki Latine on May 16, 1980, charging them with Attempted Murder in the First Degree, Assault in the First Degree, and four counts each of Criminal Possession of a Weapon and Criminal Possession of Stolen Property in the Third Degree (Indictment No. 2090/80). The petitioner was arraigned on that indictment on September 15, 1980. On the same day, the petitioner moved before the Honorable Burton Roberts to dismiss that indictment. He complained that he had "requested before the Criminal Court presiding justice ... and in the presence of the prosecuting Attorney for permission to testify on my own behalf. This request was never granted although my request was made in open Court." The assistant district attorney assigned to try the case, Warren Murray, responded that the petitioner had

"failed to serve written notice as required by [New York Criminal Procedure Law] Section 190.50(5)(a)." After considering the petitioner's motion, and the People's response, Justice Roberts denied the motion, concluding that Saldana did "not allege, nor does it appear from the court file that the defendant filed the requisite written notice to avail himself of this right."

Trial commenced on June 26, 1981, and on July 22, 1981, the jury found the petitioner and Latine guilty as charged. On October 1, 1981, the court dismissed one of the weapons charges, and sentenced the petitioner as noted above.

The petitioner appealed pro se to the Appellate Division, First Department, of the New York Supreme Court, raising numerous complaints about his conviction. He argued that there was insufficient evidence to prove him guilty beyond a reasonable doubt, that oral and written requests he had made to appear before the grand jury had been ignored, and that he had been denied effective assistance of counsel by his attorney's failure to retain a ballistics expert. The petitioner further contended that the prosecutor had not disclosed exculpatory ballistics evidence and had made improper comments during his opening statement and summation. Next, the petitioner argued that his conviction of Assault in the First Degree should have

been dismissed as a lesser included offense of Attempted Murder in the First Degree. He also asserted that the judge had incorrectly read a stipulation to the jury, and had erred when charging the jury on the burden of proof with respect to petitioner's admissions. Finally, the petitioner argued that he would have been charged with a lesser offense, Attempted Murder in the Second Degree, if he had committed this crime in Queens County.

While his appeal was pending, the petitioner, who was incarcerated, requested that he be allowed to present oral argument. The Appellate Division denied his request. On April 23, 1983, petitioner applied for leave to appeal that denial to the New York Court of Appeals. On May 5, 1983, the Honorable Sol Wachtler dismissed petitioner's application as not appealable under Section 450.90 of the New York Criminal Procedure Law.

The Appellate Division unanimously affirmed the petitioner's conviction without opinion on January 12, 1984. People v. Saldana, 99 A.D.2d 686 (1st Dep't 1984). The Honorable Sol Wachtler denied leave to appeal to the Court of Appeals on March 15, 1984. People v. Saldana, 62 N.Y.2d 623 (1984).

The petitioner filed his application for a writ of habeas corpus on June 18, 1984. In it, he

raised four claims. First, he argued that he had been denied his right to appeal by the refusal of the Appellate Division to allow him to argue his appeal orally. Next, he claimed that the trial court had improperly "amended" a stipulation into which the parties had entered. Third, he contended that the People had withheld exculpatory ballistics evidence from him, and that various comments made by the prosecutor in his opening statement and summation had denied him a fair trial. Finally, he maintained that he had been denied effective assistance of counsel because his attorney had failed to serve the District Attorney with written notice of the petitioner's intent to testify before the grand jury, and had failed to retain a ballistics expert.

On October 11, 1985, the District Court denied the petition for a writ of habeas corpus. The court ruled that the petitioner had no constitutional right to argue his appeal orally. With respect to the petitioner's complaint that his attorney had been ineffective for failing to serve upon the District Attorney written notice of the petitioner's intent to testify before the grand jury, the court concluded that "[w]hile the failure to provide a target the opportunity to testify on his own behalf may create the appearance of inequity . . . it does not amount to a federal

constitutional violation." Thus, the court held, "[I]t logically follows that petitioner was not constitutionally prejudiced" by his attorney's failure to secure him the opportunity to appear before the grand jury. The court "deem[ed] it appropriate to defer to the judgment of the state appellate courts" on the issue of whether the attorney's alleged omission had resulted in a denial of due process.

The District Court also noted that the petitioner had made no showing that he would have "provided any information to the grand jury that might have persuaded the grand jury not to indict him." Finally, the District Court rejected the petitioner's claims that his attorney had been ineffective for failing to consult a ballistics expert, that the People had failed to turn over exculpatory material, and that the trial court and prosecutor had behaved improperly.

After the District Court subsequently issued a certificate of probable cause, the petitioner appealed to the United States Court of Appeals for the Second Circuit. The petitioner was assigned counsel, and then moved in the District Court for relief from judgment. The District Court granted the petitioner's motion, and the case was remanded.

On remand, the petitioner claimed that New York had denied him due process and equal protection

when it required him to adhere to its procedural requirements for testifying before the grand jury. In addition, the petitioner renewed his claim of ineffective assistance of counsel.

On July 10, 1987, the District Court granted the petition. The court concluded that the petitioner had substantially complied with New York's procedural requirements for securing the right to appear before the grand jury, and that New York had denied him due process when it presented the case to the grand jury without allowing him the opportunity to testify .*

The State of New York appealed the District Court's order to the United States Court of Appeals for the Second Circuit. In an order issued June 27, 1988, the Second Circuit reversed the District Court's decision, ruling that the petitioner had failed to exhaust state remedies with respect to his claim that he was denied federal due process when New York held him to compliance with its procedural laws for appearing before the grand jury. In any event, in view of the strength of the trial evidence against him, the court concluded that the fact that the petitioner had not appeared before the grand jury could not have prejudiced him; on the contrary, "his appearance would have crippled his

---

*The District Court again rejected the petitioner's mplaints about his attorney's competence.

defense at trial" (Petitioner's Appendix: 21-A). For these reasons, the Second Circuit reversed the decision of the District Court and dismissed the petition.

The petitioner now seeks a writ of certiorari to review the Second Circuit's decision.

REASONS FOR DENYING THE WRIT

As a general rule, this Court will grant certiorari only when there are special and important reasons that compel such action. For example, the Court may grant certiorari if there are conflicts among the decisions of lower courts, or when the lower court decides important questions of federal law that this Court has not, but should settle. Rules of the Supreme Court of the United States, Rule 17 (1988). On the other hand, this Court does not sit to review decisions that turn only on the application of settled principles of law to particular factual situations. See United States v. Johnson, 268 U.S. 220, 227 (1925). Since the Second Circuit did no more than apply well established law to the facts of this case, there is no reason for this Court to grant certiorari.

The petitioner first challenges the Second Circuit's decision that he had failed to exhaust state remedies; the Second Circuit found that the state courts

had not fully considered the petitioner's grand jury claim because of conflicting factual allegations and an inadequate record on which to resolve those allegations. The petitioner argues that the state court's inability to resolve his claim should not be attributed to him because he could not have been expected to have documentary evidence of his request to testify before the grand jury. But at most, the Second Circuit's conclusion that the petitioner had not exhausted state remedies involved no novel question of federal law. The court merely made a factual determination that the petitioner had not fully apprised the state courts of the facts underlying his complaints.

Nor did the court break with any established legal precedent when it reached that conclusion. Instead, the court simply applied well settled rules of exhaustion to the facts of this case. Even accepting the petitioner's argument that that decision was incorrect, the court's decision is hardly the sort of compelling issue that would warrant review by this Court. In any event, since the Second Circuit went on to resolve the merits of the petitioner's complaint, and overlooked his failure to exhaust state remedies, the question is moot.

Certainly, the Second Circuit's decision on the merits did not implicate any issue justifying

further review. Indeed, the court need not have gone as far as it did in discussing the petitioner's claim. After all, the petitioner's assertion that his written request to a judge and his oral request satisfied New York's requirement that a defendant file written notice with the District Attorney of his intent to testify in the grand jury implicates no federal right whatsoever. Of course, there is no right to be indicted by a grand jury, and certainly no right to appear before one. Beck v. Washington, 369 U.S. 541 (1962); United States v. Ciambrone, 601 F.2d 616, 622-23 (2d Cir. 1979). Nor is New York's interpretation of its own procedural rules for securing the opportunity to testify before the grand jury a federal constitutional question. Indeed, even assuming that New York interpreted its own procedure incorrectly, that alleged error did not present a federal question, for a federal court "may not issue a writ of habeas corpus on the basis of a perceived error of state law." Pulley v. Harris, 465 U.S. 37, 41 (1984); Wainwright v. Goode, 464 U.S. 78 (1983); Barclay v. Florida, 463 U.S. 939, 957-58 (1983); Smith v. Phillips, 455 U.S. 209, 221 (1982).

While a state may not arbitrarily deny a defendant even a state created right, the petitioner does not allege that he actually complied with New York's written notice requirement; instead, he simply

complains that the state should have deemed the actions he did take to be the equivalent of compliance. That claim, of course, is purely a matter of state law. Plainly, New York's enforcement and interpretation of its own procedural laws governing the nonconstitutional right to appear before a grand jury present no federal constitutional question, and certainly no issue meriting this Court's review.

It is equally plain that the decision the Second Circuit nevertheless reached on the merits affords no basis for review. The Second Circuit concluded that any conceivable error in precluding the petitioner from appearing before the state grand jury was harmless. Like the court's resolution of the exhaustion issue, that determination involves only the application of established law to particular facts. While the petitioner detects a "conflict" between the Second Circuit's ruling and the decisions of this Court, his argument is premised on his confusion about the appropriate legal standards governing harmless error analysis. Thus, citing Evitts v. Lucey, 469 U.S. 387 (1985), in which the Court held that a defendant has a constitutional right to the effective assistance of counsel on appeal, and Griffin v. Illinois, 351 U.S.12 (1956), where the Court ruled that a state cannot deny a defendant the right to appeal simply because he cannot

afford a transcript, the petitioner argues that the Second Circuit should have applied state law in determining whether the perceived error was harmless as a matter of federal constitutional law. In fact, neither case has anything to with which standard governs in harmless error analysis; indeed, in neither case did the Court even mention the words "harmless error," let alone rule that a federal court should use state harmless error rules to determine whether a constitutional violation was harmless.

That concept was addressed, and resolved explicitly against the petitioner, in Chapman v. California, 386 U.S. 18 (1967). In that case, the Court made it clear that when the claimed error is an error of constitutional dimension, it is the federal harmless error rule that controls. Id. at 21. Accordingly, when the petitioner complained that his federal rights were violated when he did not testify before the state grand jury, the Second Circuit correctly applied federal harmless error rules to determine whether the claimed deprivation was harmless.

Of course, not even the petitioner argues that under the federal standard the alleged error contributed to his conviction. Indeed, while the Second Circuit found that the claimed error was harmless because the petitioner had no evidence to present to the grand jury,

the court could have reached the same conclusion for additional reasons. As this Court has made plain, a conviction by a petit jury renders any error in the grand jury harmless. United States v. Mechanik, 475 U.S. 66 (1986).

In short, the Second Circuit's resolution of this case fully comported with federal constitutional standards. Certainly, there is nothing unique about that resolution that requires this Court's review. For these reasons, the application for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

NORMAN BARCLAY
ANN M. DONNELLY
Assistant District Attorneys
Of Counsel

December, 1988